

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS**

Case No. 03-1259-JAR

MEMORANDUM & ORDER

Plaintiff Christina M. Stearns brings this action pursuant to 42 U.S.C. § 405(g) seeking judicial review of Defendant Commissioner of Social Security's denial of her application for a period of disability and disability insurance benefits under Title II of the Social Security Act (Act) and supplemental security income under Title XVI of the Act. According to plaintiff, the defendant failed to accord adequate weight to the opinions of her physicians and selectively relied on isolated evidence rather than the record as a whole, resulting in an improper determination of plaintiff's mental residual functional capacity and resulting ability to work. As explained in more detail below, the Court rejects each of plaintiff's arguments and affirms defendant's decision.

I. Procedural Background

On February 14, 2002, and February 26, 2002, plaintiff's applications for a period of disability, disability insurance benefits, and supplemental security income were filed. Plaintiff claimed disability since August 5, 2001, due to injuries suffered in a car accident, including

problems with her right arm and her mental functioning. The application was denied both initially and upon reconsideration. At plaintiff's request, an administrative law judge (ALJ) held a hearing on December 19, 2002, at which both plaintiff and her counsel were present. On February 25, 2003, the ALJ rendered a decision denying all benefits, on the basis that plaintiff was not under a "disability" as defined by the Act. After the ALJ's unfavorable decision, plaintiff requested review by the Appeals Council; her request for review was denied on May 23, 2003. Thus, the ALJ's decision is the final decision of defendant.

II. Standard of Review

Judicial review under 42 U.S.C. § 405(g) is limited to whether defendant's decision is supported by substantial evidence in the record as a whole and whether defendant applied the correct legal standards.¹ The Tenth Circuit has defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."² In the course of its review, the court may not reweigh the evidence or substitute its judgment for that of defendant.³

III. Relevant Framework for Analyzing Claim of Disability and the ALJ's Findings

"Disability" is defined in the Act as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment"⁴ The Act

¹See *White v. Massanari*, 271 F.3d 1256, 1257 (10th Cir. 2001) (citing *Castellano v. Sec'y of Health & Human Servs.*, 26 F.3d 1027, 1029 (10th Cir. 1994)).

²*Id.* (quoting *Castellano*, 26 F.3d at 1028).

³*Id.*

⁴*Williams v. Bowen*, 844 F.2d 748, 750 (10th Cir. 1988) (quoting 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A) (1982)).

further provides that an individual “shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy”⁵

The Social Security Administration has established a five-step sequential evaluation process for determining whether a claimant is disabled,⁶ and the ALJ in this case followed the five-step process. If a determination can be made at any of the steps that a claimant is or is not disabled, evaluation under a subsequent step is not necessary.⁷ Step one determines whether the claimant is presently engaged in substantial gainful activity.⁸ If she is, disability benefits are denied.⁹ If she is not, the decision maker must proceed to the second step.¹⁰ Here, the ALJ determined that plaintiff was not engaged in substantial gainful activity and, thus, properly proceeded to the second step.

The second step of the evaluation process involves a determination of whether “the claimant has a medically severe impairment or combination of impairments.”¹¹ This determination is governed by certain “severity regulations,” is based on medical factors alone, and consequently, does not include consideration of such vocational factors as age, education,

⁵*Id.* (quoting 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B) (1982 & Supp. III 1985)).

⁶*See id.* (citing 20 C.F.R. §§ 404.1520, 416.920 (1986)).

⁷*Id.*

⁸*Id.*

⁹*Id.*

¹⁰*Id.*

¹¹*Id.* (quoting *Bowen v. Yuckert*, 482 U.S. 137, 140-41 (1987)).

and work experience.¹² Pursuant to the severity regulations, the claimant must make a threshold showing that her medically determinable impairment or combination of impairments significantly limits her ability to do basic work activities.¹³ If the claimant is unable to show that her impairments would have more than a minimal effect on her ability to do basic work activities, she is not eligible for disability benefits.¹⁴ If, on the other hand, the claimant presents medical evidence and makes the de minimis showing of medical severity, the decision maker proceeds to step three.¹⁵ The ALJ in this case concluded that plaintiff satisfied the severity requirement based on the following impairments: status-post motor vehicle accident; status-post right shoulder surgery; migraine headaches; and post-concussional syndrome. Thus, the ALJ proceeded to step three.

In step three, the ALJ “determines whether the impairment is equivalent to one of a number of listed impairments that the Secretary acknowledges are so severe as to preclude substantial gainful activity.”¹⁶ If the impairment is listed and thus conclusively presumed to be disabling, the claimant is entitled to benefits.¹⁷ If not, the evaluation proceeds to the fourth step, where the claimant must show that the “impairment prevents [the claimant] from performing work [she] has performed in the past.”¹⁸ If the claimant is able to perform her previous work, she

¹²*Id.* (citing 20 C.F.R. §§ 404.1520(c), 416.920(c) (1986)).

¹³*Id.* at 750-51 (citing 20 C.F.R. §§ 404.1521(b), 416.921(b) (1986)).

¹⁴*Id.* at 751.

¹⁵*Id.*

¹⁶*Id.* (citing 20 C.F.R. §§ 404.1520(d), 416.920(d) (1986); *Bowen v. Yuckert*, 482 U.S. at 141).

¹⁷*Id.*

¹⁸*Id.* (citing 20 C.F.R. §§ 404.1520(e), 416.920(e) (1986); *Bowen v. Yuckert*, 482 U.S. at 141).

is not disabled.¹⁹ With respect to the third step of the process in this case, the ALJ determined that plaintiff's impairments were not listed or medically equivalent to those listed in the relevant regulations. At the fourth step, the ALJ concluded that plaintiff was unable to perform past relevant work.

Thus, the ALJ proceeded to the fifth and final step of the sequential evaluation process—determining whether the claimant has the residual functional capacity (RFC) “to perform other work in the national economy in view of [her] age, education, and work experience.”²⁰ At that point, the ALJ properly shifted the burden of proof to defendant to establish that plaintiff retains the capacity “to perform an alternative work activity and that this specific type of job exists in the national economy.”²¹ At this step, the ALJ concluded that plaintiff was not disabled, finding that plaintiff, despite possessing certain non-exertional limitations, nonetheless could perform a significant number of jobs in the state and national economies, including small parts assembler, cashier, and information clerk.

IV. Analysis of Plaintiff's Specific Arguments

Plaintiff contends that the ALJ erred in: (1) failing to accord adequate weight to the physicians' opinions; (2) failing to rely on the record as a whole when making his determination; and (3) consequently, inaccurately assessing plaintiff's mental residual functional capacity. The Court addresses each of these arguments in turn.

A. Physicians' Opinions

¹⁹ *Id.*

²⁰ *See id.* (quoting *Bowen v. Yuckert*, 482 U.S. at 142).

²¹ *See id.* (citations omitted); *accord White*, 271 F.3d at 1258 (at fifth step, burden of proof shifts to Commissioner to show that claimant retains the functional capacity to do specific jobs).

Plaintiff believes that the ALJ must have improperly relied on the opinion of Dr. Dort, who was treating her shoulder, instead of Dr. Vesali who was treating her mental condition. The ALJ noted that “Dr. Dort indicated that the claimant was almost completely healed, was pain free, and that she had returned to a normal work schedule.” But, this Court cannot find that the ALJ ignored the opinion of Dr. Vesali, for the ALJ also noted that he was “not unmindful of Dr. Vesali’s opinion that [plaintiff] needed an additional six months of recuperation time.” Furthermore, nothing suggests that the ALJ rejected Dr. Vesali’s opinion.

Dr. Vesali opined in a January 17, 2002 letter to plaintiff’s employer, that she was “unable to perform her duties,” and therefore was “forced to take Family Medical Leave.” Plaintiff had attempted to return to work in October 2001, and this letter was apparently intended to explain that as of January 2002, plaintiff was unable to return to work. The ALJ’s opinion is in fact consistent with Dr. Vesali’s opinion in that regard, for the ALJ found that plaintiff could not return to her past employment, including the job referenced in Dr. Vesali’s January 2002 letter. Thus, nothing suggests that the ALJ ignored this opinion of Dr. Vesali.

In a September 2002 letter addressed to whom it may concern, Dr. Vesali opined that plaintiff needed an additional six month recuperation time. Dr. Vesali did not explain whether she needed recuperation time from her past job, so it is unclear whether he meant that after six months plaintiff could return to that particular job. If Dr. Versali’s January and September letters are inconsistent, it is the ALJ’s duty as the trier of fact to resolve conflicts in the evidence.²² The ALJ resolved any conflict or ambiguity in Dr. Versali’s letters, in plaintiff’s favor. He found

²²See *Casias v. Secretary of HHS*, 933 F.2d 799, 801 (10th Cir. 1991) (citing *Richardson v. Perales*, 402 U.S. 389, 399 (1971)).

that plaintiff could not return to that past job, nor any of her past jobs. More importantly, the ALJ properly looked at all the evidence and determined that Dr. Vesali never placed any limitations on plaintiff performing jobs within her RFC.

Plaintiff also argues that the ALJ did not sufficiently discuss, nor give substantial weight to Dr. Vesali's opinion, as is required when considering the opinion of a treating physician.²³ But the record demonstrates that the ALJ discussed Dr. Vesali and his findings, in two separate paragraphs analyzing the evidence, and gave due weight to his Dr. Vesali's opinions.

Plaintiff also complains that the ALJ failed to give Dr. McNamara's opinion appropriate consideration. Dr. McNamara examined plaintiff on one occasion at the direction of Dr. Vesali. Plaintiff argues that the ALJ did not consider Dr. McNamara's statements in a January 16, 2002 letter informing plaintiff's former employer of her inability to perform that work. But the ALJ's opinion that plaintiff could not return to her former work is not inconsistent with Dr. McNamara's opinion that plaintiff would have "lingering problems with efficiency in shifting her focus of attention as is required in multi-tasking, concentration in the presence of distractions, and efficiency in problem solving and organization of unfamiliar material." And the ALJ obviously took these limitations into consideration when he determined plaintiff's RFC included moderate limitations in the ability to understand, remember, and carry out detailed instructions; to maintain attention and concentration for extended periods; and to respond appropriately to changes in the work setting. He also considered the opinion when determining plaintiff could only engage in work that was simple, routine, repetitive, and non-stressful in nature. The ALJ

²³See *Watkins v. Barnhart*, 350 F.3d 1297, 1300 (10th Cir. 2003) (quoting Soc. Sec. Reg. 96-2p, 1996 WL 374188, at *2)).

gave proper weight to the physicians' opinions in the record.

B. Consideration of the Entire Record

Plaintiff contends that in finding plaintiff not disabled, the ALJ relied on isolated evidence from the record rather than relying on the record as a whole. The ALJ's decision must show that he considered all the evidence in the record, but he is not required to discuss every piece of evidence.²⁴ He is required to discuss any uncontroverted evidence he chooses not to rely on and any significantly probative evidence he rejects.²⁵ Plaintiff believes the ALJ's failure to discuss an "ineligible" rating plaintiff received on a post office test was in error. However, these test results are not significantly probative of whether plaintiff can perform the jobs the ALJ determined she was capable of performing based on her RFC.

Plaintiff also believes the ALJ relied on selective parts of Dr. McNamara's opinion that supported the ALJ's determination that plaintiff is not disabled, while ignoring evidence supporting a disability determination. Plaintiff cites passages from Dr. McNamara's January 26, 2002, opinion in which he stated that plaintiff had problems performing some tests and the test results showed some limitations in her cognitive functioning. Dr. McNamara also mentioned that the results from the tests he performed "indicated some problems that would call for caution in her attempts to handle increasing pressures." But, as previously discussed, the ALJ did not ignore or reject these opinions. In fact, the ALJ considered this when determining limitations in plaintiff's mental RFC, such as limiting her to only simple, routine, repetitive, and non-stressful

²⁴*Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996) (citing *Vincent ex rel. Vincent v. Heckler*, 739 F.3d 1393, 1394-95 (9th Cir. 1984)).

²⁵*Id.*

jobs.

Plaintiff also claims that the ALJ failed to consider Dr. Vesali's February 28, 2003, letter in which he refers to Dr. McNamara's test results confirming a closed head injury with associated "post concussive syndrome." But, the ALJ obviously considered this evidence; he found one of plaintiff's severe impairments was "post-concussional syndrome." Plaintiff claims that the ALJ erred in not considering another statement in this letter, that Dr. Vesali had advised plaintiff to go on "short-term disability to allow herself to recover from this accident." But it is the ALJ's duty to determine plaintiff's disability; he need not adopt a physician's opinion on the ultimate issue of disability.²⁶ Furthermore, a "short-term disability," is not necessarily germane to the ALJ's determination of whether a claimant had a disability lasting or expected to last at least twelve months.²⁷ The ALJ appropriately considered all the medical evidence in the record when making his disability determination.

Plaintiff further argues that the conclusion that unskilled work is non-stressful is questionable and has no basis in fact.²⁸ But the ALJ never stated that he believed unskilled work was non-stressful. He merely included a limitation that plaintiff only perform non-stressful work based on his interpretation of the medical evidence. The ALJ did not state that plaintiff was limited to unskilled work. Thus, plaintiff has not shown how the ALJ's assessment of her RFC was in error.

²⁶*Castellano v. Sec'y of Health & Human Servs.*, 26 F.3d 1027, 1029 (10th Cir. 1994)(citing 20 C.F.R. §§ 404.1527(e)(2), 416.927(d)(2)).

²⁷42 U.S.C. § 423(d).

²⁸*Plaintiff cites Fehrenback v. Halter*, No. 99-1436 (D. Kan. 2001); *Williams v. Apfel*, No. 99-1435 (D. Kan. 2001); *Reed v. Apfel*, No. 00-1047 (D. Kan. 2000); *Lewis v. Apfel*, No. 99-1174 (D. Kan. 2000); *Walker v. Apfel*, No. 97-1189, 1998 WL 928672, *4 (D. Kan. 1998).

Finally, because the ALJ properly weighed the physicians' opinions and relied on the evidence as a whole when determining plaintiff's RFC, his resulting determination that plaintiff could perform work in the economy was supported by substantial evidence and must be upheld. In sum, having carefully reviewed the record in this case and having considered plaintiff's arguments in light of the record, the Court concludes that substantial evidence supports defendant's decision to deny plaintiff's application for disability benefits and that no deviation from established legal standards occurred.

IT IS THEREFORE ORDERED BY THE COURT THAT plaintiff's motion for judgment is **denied** and defendant's decision denying plaintiff disability benefits is affirmed.

IT IS SO ORDERED.

Dated this 9th day of August, 2004, at Topeka, Kansas.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge